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Illinois Bell Telephone Company	)	
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Application for Review of Alternative	)	Docket No. 98-0252
Regulation Plan	)	
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Illinois Bell Telephone Company	)	
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Petition to Rebalance Illinois Bell	)	Docket No. 98-0335
Telephone Company's Carrier Access and	)	
Network Access Line Rates	)	
	)	
Citizens Utility Board, People of the State of	)	
Illinois	)	Docket No. 00-0764
v.	)	
Illinois Bell Telephone Company	)	(Consol.)

REPLY BRIEF OF AMERITECH ILLINOIS  
ON IMPACT OF NEW LEGISLATION

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Illinois Bell Telephone Company ("Ameritech Illinois" or "the Company"), by its attorneys, hereby files its Reply Brief on the impact of amendments to the Public Utilities Act which became effective on June 30, 2001. Initial Briefs were filed by the Staff of the Illinois Commerce Commission ("Staff"), the Governmental and Consumer Intervenors ("GCI"), the City of Chicago ("City"), AT&T Communications of Chicago, Inc. ("AT&T"), and McLeodUSA Telecommunications Services, Inc. ("McLeodUSA").

I. SERVICE QUALITY ISSUES

A. CUSTOMER COMPENSATION UNDER THE ALTERNATIVE REGULATION PLAN SHOULD BE IDENTICAL TO THAT REQUIRED BY THE COMMISSION'S RULES IMPLEMENTING SECTION 13-712.

Both Staff (Init. Br. on New Law, pp. 6-10) and GCI (Init. Br. on New Law, pp. 6-10) contend that the Commission should impose customer-specific service quality remedies on Ameritech Illinois that would be more stringent than those required by Section

13-712. They argue that H.B. 2900 merely sets minimum service quality standards, and that the Commission may set additional or more stringent requirements. For example, Staff argues that “Sections 13-712(a) and (d) make it clear that the provisions in the legislation set forth only the minimum levels of remedies required. Therefore, the Commission may adopt additional and/or stricter standards.” (Staff Init. Br. on New Law, p. 7 (emphasis in original); see also GCI Init. Br. on New Law, p. 7).

First, as a matter of policy, there is no logical relationship between the service quality goal of the Alternative Regulation Plan—to “maintain” service at established levels (220 ILCS 13-506.1(b)(6))—and customer compensation mechanisms that are not related to historical performance benchmarks. This is clear from the structure of the existing Alternative Regulation Plan, which does not provide customer-specific compensation, but instead relies on generalized rate reductions as incentives for the Company to meet the Commission’s performance benchmarks. As Mr. O’Brien and Mr. Hudzik testified, automatic customer compensation, independent of performance benchmarks, is fundamentally inconsistent with the goal of “maintaining” service quality at established levels. (Am. Ill. Ex. 3.4, pp. 9-10; Am. Ill. Ex. 12.1, pp. 36-38, 44). The Proposed Order appropriately recognizes that “an immediate and automatic credit such as [Staff and GCI] propose would void the benchmarks altogether . . .” HEPO, Section VII, F, Commission Analysis and Conclusion, par. 15. The ALJs’ reasoning is clearly correct in that regard. Customer compensation, independent of performance, is fundamentally inconsistent with the Commission’s established approach to maintaining service quality. For the same reason, the Alternative Regulation Plan cannot properly be used as an excuse to ratchet upward the service quality penalties established by the Commission’s rules implementing

Section 13-712.<sup>1</sup>

Alternative regulation and customer compensation are also unrelated from the customer's viewpoint. If a customer has been affected by a repair delay, an installation delay or a missed appointment, that customer is unlikely to know or care how the carrier is regulated. The customer will have experienced the same level of inconvenience, and will expect the same compensation, regardless of the manner in which the carrier might be regulated.

Staff and GCI also misconstrue both new Section 13-712 and Section 13-506.1 of the Act. It is true, as Staff and GCI argue, that Section 13-712 sets only the minimum service quality standards to be adopted by the Commission. However, Section 13-712 also requires that service quality standards be imposed via rulemaking and that they be imposed equally on all carriers. Section 13-712 does not allow the Commission to require that some carriers compensate their customers differently from others.

Section 13-712 declares, "It is the intent of the General Assembly that every telecommunications carrier meet minimum service quality standards in providing basic local exchange service . . ." 220 ILCS 5/13-712(a) (emphasis added). The General Assembly therefore directs the Commission to adopt rules that "shall, at minimum, require

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<sup>1</sup> To the extent that the provisions of Section 13-506.1 might appear to conflict with those of Section 13-712, Section 13-712's requirement of uniform compensation according to the Commission's implementing rules should govern over Section 13-506.1's goal of maintaining service quality under the Alternative Regulation Plan. First, Section 13-712 specifically addresses customer compensation, while Section 13-506.1 simply states a general goal of alternative regulation. One of the primary rules of statutory construction is that the more specific provision (Section 13-712) governs over the more general one (Section 13-506.1). Hernon v. Carrigan Construction Co., 149 Ill. 2d 190, 195 (1992); accord Bowes v. City of Chicago, 3 Ill. 2d 175, 205 (1954). This is true "especially where [as here] the particular provision is later in time of enactment." Bowes, 3 Ill. 2d at 205; see also Jahn v. Troy Fire Protection District, 163 Ill. 275, 282 (1994).

However, there need be no conflict between Sections 13-712 and Section 13-506.1. As explained above, the service quality goal of alternative regulation—that service quality be maintained at established levels—can and should be implemented through annual benchmarks and penalties. See 220 ILCS 5/13-506.1(b)(6); 1994 Order, p. 58. The Commission can avoid any possible conflict between Sections 13-506.1 and 13-712 by ordering, in this proceeding, that customer compensation be identical to that imposed under the Commission's rules implementing Section 13-712. That construction is clearly preferable to one that would create a conflict between the two provisions. See Mann v. Board of Education, 406 Ill. 224, 230 (1950).

each telecommunications carrier” to meet the Commission’s service standards. Id. at 5/13-712(d)-(e) (emphasis added). Customer compensation then must be provided by each carrier, as provided in the Commission’s rules. Id. at 5/13-712(e)(1)-(5). The General Assembly clearly contemplated a single rule, with uniform compensation for all customers, regardless of whether that customer’s local exchange company was subject to rate-of-return regulation, alternative regulation, or neither.

Similarly, Staff and GCI argue that Section 13-506.1 of the Act permits the Commission to increase the customer compensation requirements applicable to Ameritech Illinois as a part of its Alternative Regulation Plan. For example, Staff argues that “the Commission’s authority pursuant to Section 13-506, which remains unaffected by HB2900, clearly provides it with authority to act beyond the mandated minimum levels.” (Staff Init. Br. on New Law, p. 9 (emphasis added); see also GCI Init. Br. on New Law, pp. 9-10).

This argument finds no support in the language of Section 13-506.1 or Section 13-712. Nothing in Section 13-506.1 overrides the General Assembly’s decision, in enacting Section 13-712, to require the Commission to adopt, by rule, a uniform system of customer compensation for all carriers. Nor does anything in Section 13-712 permit the Commission to impose customer compensation on Ameritech Illinois, or any other carrier, by any means other than a rulemaking proceeding. In fact, neither Section 13-506.1 nor Section 13-712 refers to the other at all.

In short, both law and policy require that the position of Staff and GCI be rejected. Ameritech Illinois should compensate customers for service quality failures in precisely the same manner that the Commission requires of all carriers pursuant to Section 13-712 and the Commission’s rules implementing that provision.

B. WHOLESALE SERVICE QUALITY MUST BE ADDRESSED IN A RULEMAKING PROCEEDING.

McLeodUSA continues to argue that the Commission should order that the obligations of Merger Condition 30, regarding wholesale service quality, be incorporated into Ameritech Illinois' Alternative Regulation Plan. (McLeodUSA Init. Br. on New Law, pp. 2-6). McLeodUSA's argument should again be rejected. Indeed, H.B. 2900 simply reinforces the reasons for which the Hearing Examiners rejected this argument in the Proposed Order.

New Section 13-801 of the Act applies only to carriers subject to alternative regulation. The General Assembly required that this provision be implemented via rulemaking pursuant to Section 13-712, not through the alternative regulation plan. As McLeodUSA notes, "New §13-712(g) of the PUA (220 ILCS 5/13-712(g)), as added by HB 2900, directs that 'The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.'" Thus, as McLeodUSA concedes, "Section 13-801(g) mandates a rulemaking on wholesale service quality rules and remedies" with respect to those carriers. (McLeodUSA Init. Br. on New Law, p. 4 (emphasis added)).

McLeodUSA recognizes these requirements, but argues that the Commission should nevertheless act on wholesale service quality in this docket, because the wholesale rulemaking proceeding "could, based on past experience, easily take more than a year to complete." (McLeodUSA Init. Br. on New Law, p. 5). McLeodUSA's suggestion should, and indeed must, be rejected. The General Assembly has, in McLeodUSA's own words "mandated" that wholesale service quality for carriers subject to alternative regulation be addressed in a rulemaking proceeding. (Id., p. 4). The General Assembly obviously understood that the rulemaking process takes time, but it decided that the time needed to complete a rulemaking proceeding was reasonable and appropriate in light of the

importance and complexity of the subject matter. The Commission may not end-run the explicit rulemaking requirement in Section 13-712(g), simply because McLeodUSA finds it inconvenient to wait for the conclusion of that process.

The rulemaking requirement in Section 13-712(g) also reinforces the findings of the Proposed Order concerning wholesale service quality. The Proposed Order concludes:

We see no good reason to further expand the scope of this docket. The Commission will adopt McLeod's proposal that we address issues concerning wholesale service quality in Docket 01-0120. Issues concerning wholesale service quality can also be addressed in a wide variety of other proceedings, as Ameritech Illinois observed. The record in this proceeding is simply inadequate to address, in any meaningful way, the issues of wholesale service quality.

(HEPO, Section VII, G, 3, Commission Analysis and Conclusion). A rulemaking proceeding will afford McLeodUSA and other CLECs an adequate opportunity to be heard, and it will also provide the Commission with an adequate record upon which to determine the manner in which it will implement wholesale service quality requirements.

Finally, the finding that McLeodUSA urges the Commission to include in it order in this proceeding would be meaningless, because all of the Commission's substantive wholesale service quality standards will be determined in other proceedings—most obviously Docket 01-0120 and the rulemaking proceeding to implement Section 13-712(g). Simply reciting that wholesale service quality standards “shall be incorporated into Ameritech's alt reg plan,” as McLeodUSA requests (Init. Br. on New Law, p. 5), would add nothing to the substantive provisions adopted in Docket 01-0120, the rulemaking proceeding, or other wholesale proceedings.<sup>2</sup>

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<sup>2</sup> McLeodUSA's position is legally flawed for another reason. McLeodUSA argues that the Commission should order that Merger Condition 30 be incorporated into the Plan for “as long as an alt reg plan remains in effect for Ameritech.” (McLeodUSA Init. Br. on New Law, p. 2). However, an administrative body may not enter a valid order that would tie the hands of its successors. As a result, the Commission may not limit the ability of a future Commission to review any aspect of the Plan. See Cannizzo v. Berwyn Township 708 Community Mental Health Bd., 318 Ill. App. 3d 478, 482-86 (1<sup>st</sup> Dist. 2001).

C. H.B. 2900 REQUIRES THE COMMISSION TO ADDRESS COMPENSATION OF CLECS FOR RETAIL SERVICE QUALITY REMEDIES IN A RULEMAKING PROCEEDING, NOT IN THIS PROCEEDING.

McLeodUSA also argues that, “if the Commission incorporates requirements for Ameritech to compensate retail customers for service quality violations as part of alt reg plan [sic], the Commission must also include a provision in the alt reg plan requiring Ameritech to provide comparable compensation to CLECs for wholesale service quality failures or deficiencies which result in a service outage, or a delay in installation of service, to a CLEC’s retail customer.” According to McLeodUSA, “if the Commission were to fail to incorporate this important requirement, then Ameritech would in effect be given a competitive advantage over the CLECs . . .” McLeodUSA’s argument should be rejected for reasons very similar to those above.

First, as is true for McLeodUSA’s prior argument, Section 13-712(g) of the Act requires that wholesale service quality be addressed in a rulemaking proceeding, not here. 220 ILCS 5/13-712(g). The Commission may not ignore that requirement.

Second, McLeodUSA’s rights can be fully protected, and are far better addressed, in other proceedings. In fact, the Commission has already provided everything that McLeodUSA has requested. As McLeodUSA recognizes (Init. Br. on New Law, p. 8), the Commission has provided the same protection that McLeodUSA seeks here in its emergency rule implementing Section 13-712. Specifically, Section 732.30(d) of the emergency rule implements Section 13-712(e)(4) of the Act. Those provisions, according to McLeodUSA are “in essence, what McLeodUSA has proposed in its BOE in this case.” (*Id.*, pp. 7-8). Since McLeodUSA has already been given the relief it seeks, there is nothing more to be provided here.

Third, to the extent that anything should be added to the provisions already adopted by the Commission in its emergency rule, this docket does not provide the Commission with any record on which to do so. McLeodUSA argues that the Commission’s emergency

rule lacks “specific criteria for determining the conditions under which a CLEC will be entitled to compensation from an ILEC for a wholesale service quality failure” and “specific procedures to ensure that reimbursement is promptly made by Ameritech to the CLEC.” However, those issues were not addressed in this proceeding. Thus, as McLeodUSA recognizes, those issues will not be resolved here, but instead must be resolved in a separate rulemaking proceeding. (*Id.* at 9, n. 8). As a result, addressing wholesale service quality issues here, once again, would add nothing of substance to the Commission’s rules and orders substantively addressing wholesale issues.

## II. STRUCTURE OF THE BASKETS

Staff contends that the new flat rate calling plans should be assigned to the Residence basket. (Staff Init. Br. on New Law, p. 4). As Ameritech Illinois explained in its Initial Brief, it does not oppose Staff’s proposal. (Am. Ill. Init. Br. on New Law, p. 11). However, Staff’s approach does not go far enough. The introduction of these new services, combined with other relevant policy and legal considerations, support consolidating all residence services into the Residence basket and eliminating the Other basket. (Am. Ill. Init. Br. on New Law, pp. 10-12).

GCI and the City suggest that, instead of consolidating these packages with other residence services, the Commission create a new, “statutory” basket for these packages and only these packages. (GCI Init. Br. on New Law, pp. 10-11; City Init Br. on New Law, p. 4). GCI and the City rationalize this proposal on the grounds that the new packages combine services that have traditionally been assigned to the Residential and Other baskets, as well as competitive services.

Ameritech Illinois agrees that the new packages will cross existing basket boundaries. It is for this reason that the Company is urging that the Residence and Other baskets be consolidated. With the expiration of the five-year rate cap on services in the

Residence basket and the introduction of new access line/usage/vertical feature packages, the Commission's 1994 policy goal of separating essential and discretionary residence services has been superseded by events.

The GCI/City proposal to create another basket is going in precisely the wrong direction. Under their approach, access lines and usage would appear in two baskets (Residence and Statutory), and vertical features would appear in two baskets (Statutory and Other). Basket assignments would not be based on any inherent differences between the services, but rather on the vagaries of whether customers bought these services as part of a package or on an à la carte basis. Therefore, their proposal finds no support in the policy objectives outlined in the Commission's 1994 Order or in Section 13-506.1 of the Act.

GCI contends that the fact that the statutory packages cross basket boundaries requires establishment of another basket. As noted above, this supports basket consolidation, not a new basket. GCI presents no meaningful policy justification for overlapping and duplicative basket assignments.<sup>3</sup>

GCI further notes that the packages will contain both competitive and noncompetitive services as of June 1, 2003, when residence vertical services are classified as competitive. In fact, the packages will contain competitive services from the outset, because voice mail is a competitive service today and because the two-line package contains Band C calling, which is also competitive. The fact that heretofore competitive

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<sup>3</sup> In their Reply Brief on Exceptions, GCI/City contended that the statutory packages should be placed in their own basket to prevent Ameritech Illinois from decreasing the price of the packages in order to increase the price of the residence network access line and/or increasing the price of the packages by decreasing prices for other services. (GCI/City Br. on Exc., pp. 12-13). Neither scenario is realistic. The Commission would have to grant the Company significant pricing flexibility within the context of the Plan for there to be any meaningful changes in network access line rates. As the Plan stands today -- and the Proposed Order contemplates that these restrictions will continue -- Ameritech Illinois cannot increase prices at all (assuming continuation of current economic conditions). Therefore, placing the statutory packages in the Residence basket would not result in rate increases for either the NAL or the new statutory packages. Even if the Commission were to approve some degree of pricing flexibility within the context of the Plan, it retains the authority to disapprove rate changes in the annual price cap filing process which are not in the public interest. Thus, GCI/City's "parade of horrors" has no factual basis and it should be ignored.

services will be reclassified as noncompetitive as part of a package is simply a fact of the new legislation. It says nothing about what basket the services should be assigned to.

The Commission should adopt Ameritech Illinois' recommendation to consolidate these baskets. In the event consolidation is deemed to be inappropriate, then the Commission should adopt Staff's proposal to make the statutory packages part of the Residence basket.

AT&T contends that the Commission should retain the Business basket and reassign business wholesale/resale services to it from the Carrier basket. Under AT&T's proposal, wholesale/resale services used to provide residence services would be reassigned to the Residence basket. (AT&T Init. Br. on New Law, pp. 4, 6). The Company disagrees. Ameritech Illinois does not believe that any of these wholesale/resale services should be subject to the price index in the first place. As the Company explained in detail in its Brief on Exceptions, it is legal error to require price reductions in either wholesale/resale or UNE products and services beyond what is required by TA 96. (Am. Ill. Br. on Exc., pp. 21-26). Contrary to AT&T's contentions, allowing wholesale/resale to "decline with their retail counterparts" is completely consistent with applicable law, which requires Ameritech Illinois to maintain a fixed relationship between wholesale/resale and retail rates. Arbitrary rate reductions based on the price index are not consistent with applicable law.

In the event that the Commission disagrees, the Company believes that carrier services should be removed from the Carrier basket as part of collapsing all of the baskets into one. As Staff points out, wholesale/resale services are only subscribed to by carriers and should be part of a Carrier basket. (Staff Init. Br. on New Law, p. 5). There is no policy or economic logic to reassigning wholesale/resale service to the Residence and Business baskets, while leaving UNEs, switched carrier access and other miscellaneous carrier services in the Carrier basket.

### III. REINITIALIZATION OF RATES

GCI contends that HB2900 supports its position that Ameritech Illinois' rates must be reinitialized based on a revenue requirements analysis in order to be "just and reasonable" and that competitive services must be part of that analysis. (GCI Init. Br. on New Law, pp. 3-4). GCI argues that the General Assembly's failure to alter the provisions of the Public Utilities Act in response to existing statutory construction means that the "legislature did not intend to change the meaning and effect of the law". (*Id.*, p. 3).

The principle which GCI cites provides no support for its position -- in fact, it supports the Proposed Order's approach to rate reinitialization. There is no case law construing the term "just and reasonable" rates in the context of an alternative regulation plan review proceeding under Section 13-506.1 and there is certainly no case law which suggests that competitive services are part of such a review proceeding. Section 13-506.1 is clear on its face that alternative regulation only applies to noncompetitive services. The cases cited by GCI were all decided in the context of companies subject to rate of return regulation, where the determination of "just and reasonable" rates has a different basis than it does under Section 13-506.1. From the outset of this proceeding, GCI has refused to acknowledge the fact that Section 13.5-6.1 expressly permits replacement of earnings-based regulation with other regulatory models and that the Commission exercised that authority in 1994. Thus, the fact that Section 13-506.1 was not changed in the recent rewrite says nothing about the relevant legal, economic and policy considerations which must determine the Commission's decision in this proceeding.

In fact, the one existing judicial construction of Section 13-506.1 stands for the proposition that earnings analysis is inapplicable in the context of price regulation. GCI's view that earnings are the litmus test of reasonable rates, no matter what plan of regulation the Commission adopts, is essentially a variant on CUB's 1994 argument to the Appellate

Court that any system of regulation must continue to regulate earnings. The Appellate Court rejected CUB's argument out of hand:

"CUB asserts, without support, that the original purpose of the Act was to protect 'the public from public utilities charging rates that produce excess profits.' CUB argues that Section 13-506.1 'subverts' this original purpose.

Assuming *arguendo* that CUB is correct about the purpose of the Act and its 'subversion' by Section 13-506.1, this does not render Section 13-506.1 beyond the state's police power...The police power provides the authority to legislate for the public good; it does not specifically define the public good or the manner in which the legislature should act pursuant to the police power. The police power, therefore, does not mandate legislation to prevent excess profits." Illinois Bell Telephone Company v. Illinois Commerce Commission, 283 Ill. App. 3d 188, 202 (2d Dist. 1996)(emphasis added). (Am. Ill. Reply Br., at pp. 41-44).

The General Assembly can be presumed to know that the Court interpreted Section 13-506.1 in this manner. Therefore, under the very cases which GCI cites, the term "just and reasonable" in Section 13-506.1 would not encompass an earnings review.

GCI further argues that competitive services must be included in the earnings analysis because Section 13-101 was amended to include the just and reasonable concept for competitive services. (GCI Init. Br. on New Law, pp. 3-4). GCI is incorrect. First, the amendment to Section 13-202 did not change existing law. The "just and reasonable" standard was already applicable to competitive services through Section 9-250 of the Act. Therefore, no inference can be drawn from the fact that it was added to Section 13-101. Furthermore, Section 13-101 is an umbrella provision which applies not only to incumbents like Ameritech Illinois, but also to IXC's and CLECs which provide only competitive services. Surely, even GCI would not contend that this amendment now requires the Commission to subject all carriers' competitive services to earnings regulation. Since Section 13-101 has no unique application to Ameritech Illinois, it has no bearing on the proper interpretation of Section 13-506.1. In fact, as Ameritech Illinois has

previously demonstrated, the Commission's ratemaking policies for competitive services have never been carrier-specific and have never been based on earnings analyses. (Am. Ill. Init. Br., p. 23, n. 3; Am. Ill. Reply Br., pp. 10-11). According to GCI's statutory arguments, the legislature must be presumed to have understood and accepted the Commission's existing policies.

In any event, the General Assembly directly addressed competitive service rate levels, when it declared business service to be competitive as a matter of law and required a \$90 million rate reduction in new Section 13-502.5(d). Based on this Section, the General Assembly obviously intended to allow Ameritech Illinois to preserve the revenue stream from its business customers, subject only to the one-time \$90 million credit. The Company expects that this credit will begin appearing on customer bills in September. Any further reductions would be inconsistent with a plain reading of Section 13-502.5.

#### IV. OTHER ISSUES

##### A. THE AMENDMENT TO SECTION 9-230 HAS NO IMPACT ON THIS PROCEEDING

GCI argues that the amendment to Section 9-230 of the Act supports the imputation of \$126 million of Ameritech Publishing, Inc.'s revenues to Ameritech Illinois' regulated accounts. (GCI Init. Br. on New Law, pp. 1-2). GCI's argument is without merit.

As explained in the Company's testimony and briefs, the Commission has no statutory authority to impute the unregulated revenues of Ameritech Illinois' directory affiliate to Ameritech Illinois' regulated accounts. Ameritech Illinois has never published the Yellow Pages or owned or controlled Yellow Pages assets, and Ameritech Illinois has no legal or regulatory obligation to publish the Yellow Pages. Therefore, the Commission may not legally punish Ameritech Illinois, through imputation, for not publishing the Yellow Pages. Furthermore, Ameritech Illinois has maximized the revenues it receives for providing services to its directory affiliate (which revenues are included in Ameritech

Illinois' regulated accounts). Revenues for listing services are at the maximum rate allowed by law, and revenues for billing and collection services are based upon market rates charged to affiliates and non-affiliates alike. Beyond these revenues for providing services, Ameritech Illinois and its ratepayers have no claim on API's directory revenues or profits.

The amendment to Section 9-230 does not remedy the Commission's lack of existing authority to impute API's revenues to Ameritech Illinois. The amendment contains no grant of authority; it contains only a revocation of authority.

Unlike Ameritech Illinois, many telecommunications carriers in Illinois historically published or controlled the Yellow Pages and received or shared in the profits of the business. The Commission has traditionally included these carriers' profits (revenues minus expenses) from directory operations in regulated accounts pursuant to its Incidental Activities rule in the Uniform System of Accounts, 83 Ill. Admin. Code, Section 711.15. The amendment to Section 9-230 revokes this authority effective May 31, 2003. However, since Ameritech Illinois has never published the Yellow Pages or participated in Yellow Page profits, Ameritech Illinois has no Yellow Page profits to include in regulated accounts. (See Am. Ill. Ex. 1.3, pp. 112-116; Am. Ill. Ex. 1.5, p. 53).

Amended Section 9-230 is inapplicable to Ameritech Illinois for another reason also. By its terms, Section 9-230 only applies in a traditional rate of return proceeding. As Ameritech Illinois and Staff have argued, and as the Proposed Order specifically finds, this proceeding is not a traditional rate of return proceeding. Ameritech Illinois is governed by a price regulation plan, and the reasonableness of Ameritech Illinois' rates for noncompetitive services under price regulation should not, and cannot reasonably, be measured by traditional rate of return principles. Price regulation and rate of return regulation are mutually inconsistent. Therefore, amended Section 9-230 has no application to this proceeding.

B. THE NEW LEGISLATION DOES NOT AUTHORIZE THE ADOPTION OF IMPROPER RECLASSIFICATION PENALTIES

AT&T reiterates its exception to the Proposed Order's decision to reject GCI/City's proposal that Ameritech Illinois be assessed a penalty of \$10,000 per day for any competitive service classification which the Commission ultimately concludes was inappropriate after contested hearings. (AT&T Init. Br. on New Law, pp. 2-4). For the reasons already fully discussed in the Company's Reply Brief on Exceptions (pp. 30-33), AT&T's exceptions are unsupported and should be rejected.

As the Company has discussed, reclassification penalties are completely unreasonable as a matter of regulatory policy. (Am. Ill. Init. Br., pp. 51-52; Am. Ill. Br. on Exc., p. 30). The fact that there are sometimes disputes over the appropriate classification of services (as there were in Docket 98-0860) is not a basis for punishing the Company, as AT&T proposes. As Staff witness Staranczak testified:

"The Company [in Docket 98-0860] did not act illegally by having the services declared competitive. Moreover, the criteria for classifying services as competitive were not established by AI but by the legislature." (Staff Ex. 2.0, p. 5).

There is absolutely no evidence in the record that Ameritech Illinois has ever acted in bad faith with respect to the classification of services as competitive. In fact, more competitive classifications have been approved than rejected by the Commission over the last several years. (Am. Ill. Ex. 1.3, pp. 29-30; Am. Ill. Ex. 1.4, pp. 42-43.)

Furthermore, this Commission's powers and authority are defined by the terms of the Public Utilities Act. Business and Professional People for the Public Interest v. Illinois Commerce Commission, 136 Ill. 2d 192, 201, 240 (1989). As the Company discussed in its Initial Brief, nothing in the Public Utilities Act permits the Commission to impose penalties in this situation. (Am. Ill. Init. Br., pp. 52-53).

AT&T asserts, as it did in its Brief on Exceptions, that H. B. 2900 “gives the Commission express statutory authority to impose penalties (see Sections 13-304 and 13-305), including penalties for improper reclassification.” (AT&T Init. Br. on New Law, p. 3). There is nothing in the language of Sections 13-304 or 13-305 which expressly (or even implicitly) supports AT&T’s assertion. Neither Section includes any reference to penalties for “improper reclassification.” Section 13-305 tracks the language of Section 5-202 of the Act (applicable to telecommunications carriers prior to July 1, 2001) insofar as it authorizes the assessment of civil penalties for failure to comply with the Act or to obey a Commission order or rule. Thus, Section 13-305 does not in any way broaden the scope of the conduct for which civil penalties may be assessed beyond the conduct for which such penalties could have been assessed under Section 5-202 prior to the enactment of H.B. 2900. Rather, the purpose of Section 13-305 was to increase the maximum amount of civil penalties which may be assessed against telecommunications carriers for conduct which otherwise would have been subject to the lower amount of civil penalties set forth in Section 5-202. Section 13-304 provides that the Commission may assess the civil penalties authorized by Section 13-305 only after notice and an opportunity to be heard, and sets forth mitigating factors which the Commission is to consider in determining the amount of civil penalties to assess.

In sum, neither Section 13-304 nor 13-305 (nor any other provision of the Act, as amended by the new legislation) permits the imposition of penalties just because the Commission disagrees with a service reclassification on its merits. A contrary interpretation would be inconsistent not only with the plain language of those sections, but also with the principle that, in the absence of demonstrable bad faith, intentional wrongdoing or other comparable conduct, penalties are disfavored as being violative of due process. Southwestern Telegraph and Telephone Co. v. Danaher, 238 U.S. 482 (1915).

Moreover, Section 13-502(e) already provides mechanisms to ensure that the Company does not profit from, and customers are not harmed by, classifications that are later overturned: the Commission has the authority to require that rates be returned to their pre-reclassification level and that any rate increases be refunded to customers. (Am. Ill. Ex. 1.4, p. 43). In this regard, it should be noted that, although H.B. 2900 amended Section 13-502 (which governs classification of services) and added Section 13-502.5 (entitled "Services alleged to be improperly classified"), the General Assembly did not incorporate into either Section language authorizing the Commission to impose a penalty of the type espoused by AT&T. This fact further supports the conclusion that the Commission lacks the authority to impose such a penalty.

Even if Sections 13-304 and 13-305 could be interpreted as providing the Commission with authority to impose upon Ameritech Illinois a penalty for losing a contested dispute over the competitive classification of a service (and they cannot be), that legislation would clearly not support AT&T's proposed finding that Ameritech Illinois should "be required to pay the maximum penalty allowable under House Bill 2900." (AT&T Init. Br. on New Law, p. 8). As previously discussed, Section 13-304 provides that civil penalties authorized by Section 13-305 may be assessed only after notice and opportunity to be heard. Section 13-304 further provides the Commission with authority to impose less than the maximum penalty based upon a consideration of mitigating factors including, but not limited to, the respondent's due diligence in attempting to comply with the requirements of the Act or Commission orders and rules, or to secure lawful relief from those requirements. Thus, even if the Commission had authority to impose a penalty for improper reclassification (and it does not), it would be unlawful for the Commission to predetermine in this case the need to impose penalties, and the amount of such penalties, for all future cases involving a dispute over the competitive classification of service.

Finally, GCI/City's reclassification penalty proposal is outside the scope of this proceeding, which was initiated to review the functioning of the Plan under Section 13-

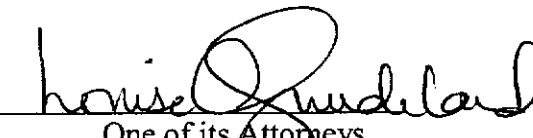
506.1. Section 13-506.1 has nothing whatsoever to do with competitive service reclassifications, which are governed by Section 13-502.

V. CONCLUSION

For all of the foregoing reasons, the Commission should adopt Ameritech Illinois' recommendations regarding modification of the Hearing Examiners' Proposed Order relative to the amendments to the Public Utilities Act.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, hereby certify that copies of the foregoing Reply Brief of Ameritech Illinois on Impact of New Legislation were served upon the attached service list via electronic mail and/or Federal Express on August 13, 2001.

  
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